Supreme Court, U.S.
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No. 88-1717

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
02061-095
Box 1700
Black Canyon Stage 1
Phoenix, Arizona 85029

QUESTIONS PRESENTED FOR REVIEW

I. Is it an abrogation of the presumption of innocence, in violation of 18 U.S.C. §3142(j), to require a guilty plea before pretrial release will be granted?

II. Is the Pretrial Detention Act, 18 U.S.C. §3142(e), unconstitutional when applied for purposes other than those specified by Congress?

III. May a conviction stand which is materially facilitated through misuse of the pretrial detention act?

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STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit from which the certiorari is sought was reported as Fassler v. United States, 858 F.2d 1016 (Fifth Cir. 1988). See Appendix A. This opinion was issued on October 27, 1988. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. §3145.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner has been deprived of his Fifth and Fourteenth Amendment rights in not being afforded due process of law.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall any state deprive any person of life, liberty or property, without due process of law:...

Further, petitioner was deprived of his Eighth Amendment rights in being required to post excessive bail.

The Eighth Amendment to the United States Constitution provides, in pertinent part, that:

> Excessive bail shall not be required...

STATEMENT OF THE CASE

This is a case in which the United States has stipulated that it used pretrial detention as a plea-bargaining tool.

On May 25, 1987, this Court filed its opinion in United States v. Salerno, 481 U.S. ___, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The following day, May 26th, Peter Affolter was arrested in New Mexico while driving on the highway with 162 pounds of marijuana. Federal D.E.A. Agents, together with New Mexico and Louisiana State Troopers, then took Affolter and his marijuana to Baton Rouge, Louisiana, where on May 28th they instructed him to make telephone contact with the petitioner, Lawrence Fassler, and to request that petitioner come to Baton Rouge to assist him with car trouble.

Affolter made at least two recorded telephone calls, during the second of which he asked the person to whom he was speaking for assistance. Approximately two hours later,

petitioner and Charles Lee drove up to Affolter's disabled station wagon in a pickup truck. As they approached, Affolter jumped out of his vehicle and ostentatiously directed them to park immediately behind his vehicle. The arrival of Lee and petitioner, and subsequent events at the scene, were videotaped and recorded.

In compliance with his prior instructions from the D.E.A., Affolter then asked petitioner a question which the D.E.A. had designed to trick petitioner into giving an incriminating answer. Instead, petitioner replied "Huh?" Affolter then repeated his question, and petitioner's second response does not appear on the videorecording. Lee and petitioner were arrested moments later, and no further conversation occurred between Affolter and petitioner.

The initial appearance was held on May 29, 1987, before the Honorable Stephen Reidlinger, U.S. Magistrate. The petitioner was initially ordered held for ten days pursuant to 18 U.S.C.

§3142(d). Although petitioner had been told by D.E.A. Agents prior to the hearing that no detention motion would be filed, an oral detention motion was made by Asst. U.S. Attorney Bradley Myers for detention pursuant to 18 U.S.C. §3142(e), and the motion was set for a later hearing.

Immediately after the Initial Appearance, D.E.A. Agent Claude Davidson told petitioner that the detention motion had been made as a ploy by the U.S. Attorney, and would be withdrawn before it was heard by the court.

On June 1, 1987, Asst. U.S. Attorney Myers informed defense attorney Rosemary Bickford that the detention motion would be dropped if the petitioner would plead guilty to charges carrying a maximum exposure of 30 years.

On June 9, 1987, the U.S. Attorney informed Rosemary Bickford and the petitioner that the government would drop the detention motion only if the petitioner pled guilty to charges carrying a maximum exposure of 20 years.

On June 11, 1987, D.E.A. Agent Ed Descenzo, specifically claiming to speak with the authorization and approval of U.S. Attorney Bradley Myers, told defense counsel Bickford and the petitioner that the government would drop the detention motion if the petitioner would first pay over to the D.E.A. the sum of Two Hundred Thousand to Two Hundred Fifty Thousand Dollars ($200,000-$250,000).

THE DETENTION PROCEEDINGS

On June 12, 1987, the detention hearing was held and Magistrate Reidlinger issued a detention order against the petitioner pursuant to 18 U.S.C. §3142(e). During the hearing, two of the three statutory bases for a detention order were readily discarded:

> Asst. U.S. Attorney Myers:
>
> I think that as a practical matter, the evidence is probably not sufficient to show that he is a risk to flee . . . I think that we would be silly to argue that he is a risk to flee. (Transcript of Hearing, pp. 72-73).
>
> U.S. Magistrate Reidlinger:

> [Danger to witnesses] is not one of the basis that they're urging for a detention. (Id., p. 13).

The Magistrate then barred the defense from cross-examining Agent Gigante as to statements she had just made suggesting such a basis.

As to dangerousness to the community, the only remaining basis, the government offered the following:

> Testimony of D.E.A. Agent Gigante: (At transcript p. 3).
>
> Q Was Mr. Fassler arrested on this -- for this case or this offense on May 28th of this year?
>
> A Yes, Sir.
>
> Q Was he indicted by the Grand Jury sitting in the Middle District of Louisiana?
>
> A Yes, Sir, he was.
>
> Q Would you tell the Court what he was indicted for, please?

A Possession of marijuana with intent to distribute and conspiracy to distribute marijuana.

Q What drug was involved in -- or what drug was Mr. Fassler accused of dealing in?

A Marijuana.

(Hearing Transcript, p. 4):

Q Do you know approximately how much?

A A hundred and sixty-two pounds.

(Id., pp. 5 and 6):

Q In doing your background check on Mr. Fassler, were you able to determine if he has any prior criminal convictions?

A Yes, he has a murder conviction from 1971 and a federal drug conviction and a state drug conviction.

Q Have you been able to obtain any information whether Mr. Fassler is currently on bond or on parole or probation for any other drug offense other than the one he's now under arrest for?

A Yes, Sir, when we arrested him he was out on bond for another marijuana charge out of Tucson, Arizona.

Q Is that a state or federal charge?

A A state charge.

Q Do you know approximately when that offense occurred?

A April of this year.

Q Do you -- are you familiar with the facts of that offense?

A Yes, Sir. He took possession of a suitcase at an airport

that was found to contain marijuana.

Q During your investigation have you been able to determine whether Mr. Fassler is involved with any drug other than marijuana?

A Yes. We have information to believe that he is also involved in heroin dealings.

Q And would you relate to the Court what information -- or why that information -- what the information is that has led you to believe he's involved with heroin?

A He was witnessed mailing a package at the airport in Tucson that was received in -- at the New Orleans Airport

(Pages 6 and 7):

and found to contain heroin.[1]

MR. MYERS: I have no further questions, your Honor.

THE COURT: Cross-examination.

(Page 8):

Q You also indicated that there was some -- you had some knowledge of his being involved in some other charges. I believe one of the charge -- one of the activities was possession of marijuana.

A Yes.

Q Okay. Do you know how much that involved?

A I was told a suitcase full. I'm --

Q I'm sorry.

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[1]On June 11, 1987, the previous day, the defendant had learned from Tucson D.E.A. agents that this incident had occurred two years before, and that someone other than the defendant had been identified as having made the shipment.

22 A I was told a suitcase full. I -- I do not know the exact

23 amount.

24 Q Okay. You don't know anything about that?

25 A No, I do not.

No other evidence of dangerousness to the community was presented to the court on the record.

The testimony of Miss Gigante was rebutted in several ways. First, Miss Gigante herself testified that she knew of no other indictments or charges pending against the petitioner for anything. (RT, p. 9, lines 5-15).

The U.S. Attorney acknowledged to the court that the petitioner's priors were twenty years old. (RT, p. 73, lines 20-22).

The petitioner presented witnesses who had come from Arizona and California to testify at the detention hearing.

The petitioner's wife testified that he had extensive family and business ties in Arizona, and had lived in the same place for over forty years. Similar testimony was also given by Agent Gigante.

The petitioner's employer testified as to the petitioner's employment at PageAmerica and role in the company. All the witnesses testified that the petitioner traveled extensively in connection with his business activities at PageAmerica and in buying and selling rare stamps and attending stamp shows.

The court refused to accept proffers from the petitioner as evidence in the hearing if the petitioner didn't testify. (RT, p. 63, lines 19-23).[2] The court also refused to allow the petitioner to take the stand without opening himself up for cross-examination on matters outside the scope of his direct testimony. (RT, pp. 66 and 67).

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[2]In footnote 5 to its opinion filed October 27, 1988, the Fifth Circuit acknowledges that the Magistrate was in error.

The great bulk of the detention hearing consisted of cross-examination by the U.S. Attorney apparently attempting to seek out suspected hidden assets of the petitioner. Mr. Myers also argued for a high bond based upon the petitioner's possible ability to make one. (RT, p. 74, line 13, through p. 75, line 7).

Mr. Myers also asked the petitioner's wife questions which suggested that the government had information that the petitioner had paid his Arizona attorney a quarter of a million dollars in fees during 1984 and 1985.

The Magistrate found that:

> There wasn't much testimony on the weight of the evidence against the person, . . (p. 82, lines 15-16).

Finally, the Magistrate ordered detention:

> I find that the government has proved by clear and convincing evidence that there aren't any conditions or combination of conditions that would primarily assure the safety of the community because of his past involvement and alleged present involvement with transporting narcotic substance. And for those reasons, I'm going to order him detained.

The detention hearing was reopened on defense motion on June 19. At the rehearing the defense put on Stanton Bloom, the petitioner's attorney in Arizona, who testified and introduced documentary evidence about the petitioner's April arrest in Tucson.

Exhibit D-1 was a copy of the statement petitioner made to the investigating officer at the time of his arrest, explaining that the suitcase wasn't his and that he didn't know what it contained.

Exhibit D-2 was the Grand Jury transcript from Arizona wherein the investigating officer falsely represented the petitioner's statement to the Grand Jury.[3]

Exhibit D-3 was a letter in which the petitioner had requested to testify at the Grand

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[3]On July 10, 1987, the Superior Court of Arizona remanded that indictment, making reference to the failure of the officer's testimony to accurately represent the facts. That indictment has not been refiled, and the statutory period to do so expired August 10, 1987.

Jury, as is permitted by Arizona law. The letter was not given to the Grand Jury before they heard and decided the matter.

Mr. Bloom testified that the marijuana involved in the Tucson case consisted of 611 grams, and that he had no knowledge of any heroin, or any other charges, against Fassler.

He also testified that he had received fees from the petitioner for work in 1984 and 1985 totalling $24,000, and not $250,000, as the U.S. Attorney had suggested to the court.

Finally, Mr. Bloom testified about the extensive experience and monitoring abilities of the federal pretrial services in Tucson, and of his contact with them in regard to this case. He testified that they had expressed a willingness to monitor petitioner on pretrial release:

> I know the person in charge of the pre-trial services in Tucson and they certainly would have no problem in monitoring Mr. Fassler. I have checked with them, there's no difficulty in that. We are of course, sixty miles from the Mexican border, the town of Nogales, Arizona is approximately sixty miles from Tucson. And that is the border town of -- crossing

> into Nogales, Sonora, Mexico. And so therefore, since our close proximity to Mexico, our pre-trial services are very stringent in terms of leaving the county and leaving Pima County. And certainly Mr. Fassler would be under those restrictions and could be checking with them at least two or three times a week whereby they monitor his services and from my knowledge, make -- are very tough and make unannounced visits to his home and things of that nature even while he's on pre-trial services. So they would have a very tight hold on him and that could be -- I assume, I have done it, in fact, in some other federal courts, but that can be a transfer of pre-trial services to another jurisdiction. (Pages 15-16).

The government's cross-examination of Mr. Bloom consisted entirely of questions relating to the petitioner's finances and to fees paid to defense counsel. The Magistrate overruled objections to those questions and ordered that they be answered.

No other evidence was presented.

On June 19, 1987, the Magistrate reopened the detention hearing and heard further evidence from witnesses for the petitioner. He then continued that hearing until June 24, 1987, for argument by counsel and a ruling.

On June 24, 1987, prior to the hearing, Magistrate Reidlinger met in chambers with the U.S. Attorney and defense counsel. The petitioner was unaware that the meeting was taking place. At that meeting, the magistrate was informed by the U.S. Attorney and by defense counsel that the government was not alleging heroin involvement and threat of violence as reasons for the detention motion.

At the same time Magistrate Reidlinger told defense attorneys Rosemary Bickford and Anthony Marabella that he would reconsider his detention order if the petitioner agreed with D.E.A. agents in Tucson, Arizona, to act as a confidential informant for them.

Magistrate Reidlinger then opened the hearing and reaffirmed his earlier detention order.

On August 11, 1987, the defense filed a motion for review of the detention order by the District Court Judge. The motion was set for August 21st at 10:00 a.m., a date and time already

scheduled for an evidentiary hearing on a pending suppression motion. (CT 36).

On August 18th, the court issued an order denying the suppression motion and cancelling the pending evidentiary hearing. (CT 133). Late on August 20th, defense counsel Nathan Fisher was notified by phone that the motion to reconsider the detention order would be heard the following day. (RT, 8/21/87, pp. 8-10). Some discussion was had on August 21st and at a status conference on August 27th an evidentiary hearing was rescheduled for September 3rd.

At the conclusion of the September 3rd hearing, the court took the motion to review the detention order under advisement. During that hearing the United States Attorney admitted that he had used the detention motion for plea-bargaining purposes, and stipulated that he had conditioned dropping the detention motion upon a guilty plea. (RT, 9/3/87, p. 8, lines 12-18) (Appendix D).

On Friday, September 4th, the petitioner caused his original Petition for Writ of Habeas Corpus to be sent to the Clerk of the District Court by Federal Express overnight delivery from Tucson, where he had had it typed. It was received by the Clerk in Baton Rouge on September 7th. (Affidavit filed 9/16/87, Appendix F). However, it was not filed by the Clerk until September 10th, the same date on which the District Court denied the then pending motion for review of the detention order. The trial began three business days later.

At the beginning of the trial on September 15th, the District Court ruled that the petition for habeas corpus would be considered after the trial. The petitioner was convicted on September 16th, and the petition for habeas corpus was denied on September 30th as moot. (Appendix H). A motion for reconsideration was filed in the District Court and it was denied on October 26, 1987. (Appendix I).

Appeal of the denial of habeas corpus was taken to the Fifth Circuit Court of Appeals, and in a reported opinion filed October 27, 1988, that court affirmed the decision below. (Appendix A). Rehearing was denied by the Circuit Court on November 21, 1988, (Appendix B), and this appeal follows.

Neither the District nor the Circuit Court has ever addressed itself to the uncontested facts of the government's use of the Pretrial Detention Act, 18 U.S.C. §3142(e), for plea-bargaining purposes.

THE TRIAL

The very brief trial in this matter consisted of little more than police testimony about the arrest of Affolter in New Mexico, his removal to Baton Rouge, the recording of two phone calls in Baton Rouge, and the videotaping of the arrival of Lee and petitioner and their arrest.

One Louisiana State Trooper testified at length as to his theory why there was no recorded

response by petitioner to Affolter's repetition of the trick question he had been instructed to ask. The Trooper then went on to testify that notwithstanding the failure of his electronic equipment to record any answer, he was personally able to hear petitioner make some kind of an affirmative response to Affolter from his vantage point in an undercover van 100 yards away. A second State Trooper who was also in the same van at the time did not claim to hear such a response, and, according to the testimony of a D.E.A. Agent who testified that she was listening to the event over separate receiving equipment in a different vehicle, she did not hear it.

Both Louisiana State Troopers were allowed to testify that they had made voice identifications of the second party to Affolter's recorded phone conversations as being petitioner by comparing the voice on the recordings of the phone calls with petitioner's voice on the videorecording, even though petitioner's voice does not appear on the

videorecording.

D.E.A. Agent Gigante also interjected nonresponsive testimony on her cross-examination to the effect that petitioner had a long history of previous violations and that Affolter had said he was bringing the marijuana to petitioner, and the jury was duly instructed to disregard that testimony.

Lee was acquitted and the petitioner was convicted on both counts.

IMPAIRMENT OF THE DEFENSE

The petitioner is a skilled and experienced paralegal, who has briefed and prevailed in criminal cases, on behalf of others, in the courts of many jurisdictions, including the Supreme Court of the United States. He had no access to a law library or any other legal materials while in pretrial detention.

The petitioner has personal investigative skills and resources which he was unable to apply while in pretrial detention. There was extensive

investigation to be done in New Mexico, Arizona and California which went undone by virtue of the pretrial detention and the petitioner's lack of sufficient financial resources to hire them done.[4]

The petitioner was under order of the U.S. Magistrate to finance and pay for his own defense. The Magistrate's determination of non-indigency was based upon the petitioner's earnings when not detained. The pretrial detention resulted in the reduction of the petitioner's salary by $2,000 monthly, and imposed substantial additional costs upon the petitioner to maintain contact with his private and professional life.

Petitioner's ability to maintain outside contacts by mail from the place of confinement was severely impaired by the failure of the East

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[4]A comprehensive and detailed exposition of the investigation and other work needed by the defense appears in the Motion for Continuance filed by the appellant, pro se, in District Court Case No. 87-019 (Cir. No. 87-3915), the record of which has been designated as part of the record in this cause. A copy of the Motion for Continuance is attached hereto as Appendix E.

Baton Rouge Parish Prison to deliver much of his mail to him.

The only effective means of contact with his personal and business ties which the petitioner had while in pretrial detention was through the use of long distance telephone and private overnight delivery services. Both were very expensive and the telephone access was not private.

The petitioner was unable to consult with his attorney on a regular basis and was unable to inform himself as to the progress of the case.

The petitioner was unable to review the physical evidence in the case before trial, particularly the videotape which required access to electronic equipment not available to or permitted the petitioner while confined.

The detention order caused the petitioner to enter and exit the courtroom during trial from the courthouse holding tank, under guard of two or three U.S. Marshals, rather than enter and exit freely as his codefendant Lee was able. The

petitioner was unable to freely move about the courtroom to consult with his counsel, as was the codefendant, and was unable to accompany his counsel during recesses in the proceedings.

Much of the preparation and investigation for trial in this cause was of such a nature that it required no special expertise, and could have easily been accomplished by the petitioner (or any other layman of average experience). During the weeks immediately prior to trial the petitioner was aware that his counsel had failed in many respects to prepare for the trial,[5] and he brought that lack of

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[5]The one area where petitioner felt counsel was properly prepared going into trial was in the preparation of an audio-visual expert to testify about the videotape. Counsel had told petitioner in July that he had spent several full days going over the videotape with the expert. However, it quickly became apparent at trial that the expert's trial testimony was confused and unprepared; and during an interview which the petitioner managed to arrange at the jail weeks after the trial he learned that his counsel had never prepared or explained to the expert what the issues for him would be, but had instead given him a completely erroneous understanding of what he would be asked to testify about. Once petitioner learned this, and simply explained the question at hand to the expert, the expert was immediately and readily able to determine that the testimony which had

preparation to the court's attention in his pro se Motion for Continuance, (Appendix E), which was filed, considered, and denied in open court on September 15, 1987, immediately prior to the start of the trial. Petitioner was unable to personally rectify the shortcomings in trial preparation because he was detained.

The petitioner was unable to approach his codefendant to discuss mutual or individual strategies while detained.

The petitioner was unable to seek out Peter Affolter, the person who had set up the petitioner at the government's direction -- but who the government did not present at trial -- because petitioner was detained.

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been offered at trial by the Louisiana State Troopers was false and scientifically impossible. He then prepared his own affidavit, and secured the services of a second audio-visual expert who also prepared an affidavit. Both of those affidavits became the basis of the Motion for a New Trial which was filed on November 4, 1987. (Appendix J).

The petitioner was unable to discover the truth about counsel's failure to prepare the expert before trial because he was being detained.

A contemporaneous record of these prejudices to the petitioner's defense exists in the September 15, 1987, Motion for Continuance. (Appendix E).

ARGUMENT

I. IT IS AN ABROGATION OF THE PRESUMPTION OF INNOCENCE TO CONDITION PRETRIAL RELEASE UPON A GUILTY PLEA.

In this cause the facts make clear, and the United States has stipulated, that the government used the Pretrial Detention Act for plea-bargaining purposes. The government made a variety of offers to the petitioner in exchange for which it would drop the pretrial detention motion. Among them were the request for payment of $200,000-$250,000 to the D.E.A., and the offer by the Magistrate to release the petitioner if he would agree to become an informant for the D.E.A. in Tucson. And, throughout, there was the requirement by the United States Attorney that the petitioner plead guilty to the indictment, first with

an exposure at sentencing of 30 years, and later with an exposure of only 20 years, to secure his release from pretrial detention.[6]

The petitioner, refusing the U.S. Attorney's "Hobson's choice," went to trial sans bail.

18 U.S.C. §3142(j) is directly on point in this case. That statute reads:

> Presumption of Innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Presumption of innocence is defined in Black's Law Dictionary as, "A hallowed principle of criminal law to the effect that the government has the burden of proving every element of a crime beyond a reasonable doubt." Plea bargaining is defined in Black's as, "The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty . . ." In this case it

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[6]The petitioner faced an exposure of 60 years by going to trial.

required that the petitioner plead guilty to a count with exposure of at least 20 years incarceration.

Thus, by definition, plea bargaining which requires a guilty plea to secure pretrial release on bail is, a fortiori, an abrogation of the presumption of innocence. As such, it constitutes a violation of 18 U.S.C. §3142(j) and a use of the Pretrial Detention Act which is barred by that statute.

II. THE PRETRIAL DETENTION ACT, 18 U.S.C. §3142(e), IS UNCONSTITUTIONAL WHEN APPLIED FOR REASONS OTHER THAN THOSE SPECIFIED BY CONGRESS.

This Court, in United States v. Salerno, 481 U.S. ___, 107 S.Ct. 2095, 95 L.Ed.2d 697 (987), upheld the pretrial detention portion of the Bail Reform Act of 1984, 18 U.S.C. §3142(e), as against the facial attack mounted by Salerno. In doing so, Chief Justice Rehnquist wrote that "pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due

Process Clause." Salerno at 95 L.Ed.2d 709. He also wrote "that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants," in rejecting the Eighth Amendment argument that the Excessive Bail Clause rendered the Act unconstitutional. Id. at 95 L.Ed.2d 712.

In the case at bar, requiring a plea of guilty to a charge carrying an exposure of 20 or 30 years imprisonment in exchange for pretrial release is, on its face, to require petitioner to accept punishment as a condition of bail. Moreover, it renders hollow the "primary function of bail": safeguarding the petitioner's right to a fair trial. This petitioner could have secured his release on bail only by waiving his right to trial and due process by pleading guilty.

Under these conditions, the Pretrial Detention Act is unconstitutional as it was applied to this petitioner.

Due Process also infers a right to the protection of 18 U.S.C. §3142(j), which preserves petitioner's presumption of innocence. By requiring a guilty plea in order to secure bail, the government unconstitutionally deprived the petitioner of that protection.

III. HABEAS CORPUS RELIEF TO CORRECT AN ILLEGAL PRETRIAL DETENTION IS NOT MOOTED BY A CONVICTION WHICH IS THE TAINTED FRUIT OF THAT ILLEGAL DETENTION.

Much as the Exclusionary Rule to redress violations of Fourth Amendment Rights has evolved to deter lawless conduct by federal officers (Rea v. United States, 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292) and to close the doors of the federal courts to any use of evidence unconstitutionally obtained, (Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437), sound public policy demands that this Court prohibit governmental abrogation of the presumption of innocence by denying the prosecution the fruit of

its wrongdoing.

On September 15, 1987, the District Court declared that it would not take up the habeas petition until after the trial which it was about to begin. It did so immediately after denying petitioner's pro se Motion for Continuance, which set forth many of the prejudices to petitioner's defense resultant from the detention, and in cognizance of the government's stipulation before the same judge several days earlier: that it had used the pretrial detention as a plea bargaining device. That the court was also familiar with the habeas petition is shown by its discussion of the matter at the time, demonstrating some previous familiarity and knowledge of the subject.

Thus the district court, to all intents and purposes, was denying the petition on September 15th when it chose to set it over until after the trial, for regardless of the outcome of the trial, the pretrial nature of the offending detention would have ceased to exist. The petitioner was

then forced to trial absent the benefits of the presumption of innocence, and suffering from the several disabilities which were enunciated in advance in the Motion for Continuance.

Nothing which occurred at trial negated that prejudice. The government's evidence was underwhelming, feeble and false on its face. (i.e., Trooper Mixon's claim to have heard an incriminating admission which is absent from the videorecording; Mixon and Trapp's assertion that they compared the voice on the recorded phone calls with petitioner's voice on the videorecording -- even though it does not appear there. A fair review of the record shows petitioner was almost certainly convicted by reason of the stricken testimony of a D.E.A. Agent who volunteered his 20-year-old record, and by the ineffective representation of his counsel.

However, ineffective representation is <u>not</u> the issue here. To require that petitioner pursue that avenue of post-conviction relief is only to

further reward the government for its transgression by prolonging his incarceration. At issue here is the illegal pretrial detention, which enabled the ineffective representation and the inappropriate prosecution evidence to accomplish the transgressor's goal: to secure a conviction.

As the Motion for Continuance (Appendix E) makes clear, petitioner had some inkling of his counsel's shortcomings prior to the start of trial, and had he been free on bail it is reasonable to assume that he would have taken steps to cure them. Likewise, had he been on bail and able to participate freely in his own defense, he would have been in a position to recognize and counter the false testimony of the State Troopers when it was offered. Also, he would have been able to do such simple things as enter and exit the courtroom with his counsel, or freely approach counsel in the courtroom, advantages which in the context of this case may have sufficed to bring the trial to a different verdict.

It is just such disabilities as these which the courts have historically had in mind when discussing the reasons for, and importance of, bail for defendants in criminal cases. To now say that this most vital right can be ignored by the government, immunizing it with the natural and foreseeable fruit of its wrongdoing, makes a mockery of the law.

A conviction which is the proximate result of illegal pretrial detention must be set aside, and this petitioner must be set free.

RESPECTFULLY SUBMITTED this 28th day of March, 1989.

Lawrence Fassler
in propria persona